United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 998

Case No. 896: BACCOUCHE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Mr. Omer Yousif Bireedo;

Whereas at the request of Habib Baccouche, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 28 September 1999, the Applicant filed an Application in which he requested, in accordance with article 11 of the Statute of the Tribunal, the revision and interpretation of Judgement No. 896, rendered by the Tribunal on 20 November 1998 (which rejected the request for revision of Judgement No. 802 rendered by the Tribunal on 21 November 1996);

Whereas the Application contained pleas which requested the Tribunal to:

"1. ...

Declare receivable and admissible the request for revision and interpretation of Judgement No. 896 ...

2. Preliminary measures

...

To establish *oral proceedings* in order to hear ... as witnesses;

3. ...

Supplement Judgement No. 802 rendered on 21 November 1996 by ordering the reinstatement of [the Applicant] at the United Nations in Geneva;

Award to [the Applicant] compensation corresponding to his base salary (Fr. 5,890 a month) for the period from 23 March – the date of his dismissal – to the date of the judgement;

Award to [the Applicant] fair compensation for part of his costs.

..."

Whereas the Respondent filed his Answer on 16 November 2000;

Whereas, on 26 June 2001, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case were set forth in Judgement No. 802.

Whereas the Applicant's principal contentions are:

1. The Tribunal erred in not ordering the reinstatement of the Applicant in Judgement No. 802.

2. The Tribunal erred in not considering the new facts raised by the Applicant in his Application under Judgement No. 896.

3. The Tribunal erred in not conducting an oral hearing on the new facts raised by the Applicant in his Application under Judgement No. 896.

4. One of the members of the Tribunal considering the Applicant's case in both earlier judgements has a longstanding friendship with one of the principals in the matter, and discussed the

case with him. This friendship casts doubt on the validity and integrity of the Tribunal's decision-making in Judgement No. 896.

5. In light of the doubt cast upon Judgement No. 896, the motives of the Tribunal in rendering Judgement No. 802 are also in doubt.

Whereas the Respondent's principal contentions are:

1. There is no provision in the Statute of the Tribunal for revision or interpretation of a Judgement that itself addresses the revision or interpretation of a Judgement.

2. The Application is an attempt to appeal Judgement No. 802 in the guise of an Application for revision.

3. In the event that the Tribunal finds the Application receivable, the Respondent wishes to resubmit its contentions from Judgement No. 896, namely that the Applicant has neither presented a fact of a decisive nature that was unknown to the Tribunal and also to the Applicant at the time of the previous Judgement, or a material error in Judgement No. 802.

The Tribunal, having deliberated from 26 June to 23 July 2001, now pronounces the following judgement:

I. The Applicant requests revision of Judgement No. 896, which was itself judgement on a request for revision of Judgement No. 802. He also requests an interpretation of Judgement No. 802.

II. The Tribunal will dispose of the request for interpretation first. The Applicant seeks interpretation not of Judgement No. 896, but of Judgement No. 802, requesting that the Tribunal "[i]nterpret the operative part of Judgement No. 802 as an order that the Applicant be reinstated as a staff member with UNOG." In Judgement No. 802, the Tribunal neither ordered the Applicant's reinstatement to his former post, nor remotely suggested that the Applicant should be reinstated. Moreover, a request for interpretation should refer to a particular point or passage in a decision whose meaning is obscure or ambiguous, thus requiring clarification from the Tribunal. The Applicant has

not signaled any particular paragraph requiring such clarification. Accordingly, the Tribunal finds that this is not a valid request for interpretation, but is a request that the Tribunal change its decision.

III. With regard to the Applicant's request for revision of Judgement No. 896, article 11 of the Statute of the Tribunal states,

> "The Secretary General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

As was the case with the Applicant's request for interpretation, this aspect of his Application is primarily directed towards appealing the original decision of the Tribunal in Judgement No. 802. However, the Statute of the Tribunal contains no provision for appeals of its judgements.

The Applicant also attempts to invoke certain "new facts" that were unsuccessfully raised in his first request for revision, including statements of the Director, UNOG, for which he offers testimony, and an affidavit from a former Executive Secretary of the Staff Coordination Council, which the Tribunal previously dismissed as irrelevant.

IV. In the instant case, the Applicant contends that, while the proclaimed enmity of the Director, UNOG, towards him is not a new fact, it having been alleged in his first request for revision, corroborating statements have since come to his attention.

The Tribunal first examined the following statement, allegedly made by the Director, UNOG to the then-Director, Conference Services Division, and to which the Applicant claims to have a witness:

> "nothing justified the dismissal of [the Applicant]; the file contained nothing serious and the party involved would probably win his case before UNAT [United Nations Administrative Tribunal]; but it was out of the question to review the decision to dismiss him *before* UNAT rendered its judgement, because such a reversal would create precedent which could encourage United Nations staff members from now on to seek annulment of decisions for dismissal, even before such requests could be referred to UNAT".

Even assuming the veracity of this allegation, the first part of the statement is no more than an opinion of the Director, UNOG, with regard to the dossier and the evidence therein, which the Tribunal is satisfied bears not the slightest relevance to Judgements Nos. 802 and 896. The Tribunal follows its own criteria regarding what constitutes pertinent evidence. The second part of the statement is equally irrelevant, as it refers merely to policy that, according to the Director, UNOG, should be followed by the Organization. The Tribunal does not consider that it reveals any particular enmity towards the Applicant.

V. The Applicant also claims that a Permanent Representative to the UN can testify on his behalf that the Director, UNOG, said of the Applicant, "that he did not want to hear about this matter nor about [the Applicant], and even less about his reinstatement", and

> "that if a note [pronouncing the reinstatement of the Applicant] arrived from New York [i.e. from the Secretary-General], he would convince [the Under-Secretary-General for Management] and advise him not to reinstate [the Applicant]".

However, as these statements were allegedly made after the delivery of Judgement No. 802 (in which the reinstatement of the Applicant was not ordered), the Tribunal observes that, far from disclosing any personal enmity directed towards the Applicant, they merely demonstrate the conviction of the Director, UNOG, that the Applicant's reinstatement would be utterly inconvenient to the interests of the Organization. The Tribunal finds this attitude neither surprising nor unfounded, taking into account the very unsatisfactory service of the Applicant during his employment with the Organization, as related in detail in Judgement No. 802. Indeed, the Tribunal did not order the reinstatement of the Applicant precisely due to his deficient service.

VI. The third "new fact" relied on by the Applicant is another statement of the Director, UNOG, which he contends reinforces his argument as to the bad faith of the Administration. The Applicant claims an unnamed staff member is prepared to testify concerning a comment of the Director, UNOG, concerning his friendship with one of the members of the Tribunal, which the Applicant contends was decisive in the Tribunal's rejection of his petition for an oral hearing. The same witness could purportedly testify about statements the Director, UNOG, ascribed to the member of the Tribunal. This witness is prepared to testify only on condition of assurance that his or her testimony will not prejudice his or her interests or position in UNOG. While the Tribunal deplores the possibility that a staff member would suffer retaliation as a result of testifying before it, it is in no position to give such assurances.

Nonetheless, the Tribunal finds that the alleged statement could not possibly have been a decisive factor in the Applicant's case. The witness could purportedly testify that he heard the Director, UNOG, say:

> "[the Applicant] will never come back to the United Nations, for that matter, according to one of my friends, a UNAT member. I managed to ensure that neither [the Applicant] nor his witnesses would be heard, and that the judgement would be postponed ... I met my friend (the UNAT member) several times; we have had a long friendship ever since he became a staff member at the Department for Disarmament Affairs."

VII. In order to appreciate the impact that this alleged new fact would have on the revision of Judgements No. 802 and No. 896, it is necessary to analyze the content and the general meaning of Judgement No. 802. The Applicant contends that that judgement had "cleared him of all grievances initially found by the JDC as justifying his dismissal." He proceeds to question why, then, he was not reinstated, and finds a basis for this alleged contradiction in the enmity of the Director, UNOG, and the influence of the said Director over one of the members of the Tribunal. Such an interpretation could not be further from the truth in Judgement No. 802, which was decided solely on the basis of the extraordinarily deficient services of the Applicant and the incredible laxity of the Administration. Judgement No. 802 relates facts found by the JDC (and never denied by the Applicant) that were decisive in the decision of the Tribunal not to order his reinstatement, and that are wholly incompatible with the Applicant's contention that the Tribunal had absolved him of all the

wrongdoing on which his termination was premised. The Tribunal recalls that the JDC included, under the title of "other serious misconduct" the following:

> "(b) Unsatisfactory service
>
> 107. The Panel found that since 1976, the year in which his permanent contract was confirmed, [the Applicant] had more than eight years of officially authorized special leave without pay. This represents approximately half of the period from 1976 to 1994.
>
> 108. To this should be added an extraordinary amount of sick leave as well as 'unauthorized leave'. (...) A quick breakdown of all leave taken by [the Applicant] (special leave without pay, sick leave, uncertified sick leave, uncertified leave and annual leave) brings out the fact that the staff member was at his post for only a quarter of the time required."

Moreover, the Tribunal found in favour of the Applicant insofar as the Administration knew of his activities and omissions and did not take measures against him. In paragraph VIII of Judgement No. 802, it is stated that: "The Tribunal regrets such laxity, which is precisely what encouraged the Applicant to pursue his activities on behalf of ROPME and for the exercise of which he had not formally obtained the approval of the Secretary-General as required by the Staff Rules."

This is far from absolving the Applicant of all guilt in the case. The Tribunal awarded him compensation only because of the incredibly permissive conduct of the Administration and its mishandling of an incident involving a security guard at the Palais des Nations. Once those wrongs had been compensated, the Tribunal did not order, as would have been within its discretion, the reinstatement of the Applicant, a staff member who had preposterously abused both his position in the Organization and the permissiveness of his superiors.

VIII. The Tribunal finds that the reasons motivating Judgements Nos. 802 and 896 are objective and grounded on facts which the Applicant could not and did not deny, and that the new facts alleged by the Applicant are not sufficient to change its decisions.

IX. In view of the foregoing. the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary